

UNITED STATES DISTRICT COURT
IN THE WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

DWAYNE GRANT, et al.,

Case No. 1:22-cv-00186

Plaintiffs,

HON. HALA Y. JARBOU
MAG. PHILLIP J. GREEN

v.

U.S. ENVIRONMENTAL PROTECTION
AGENCY, et al.,

Defendants.

DARETHA BRAZIEL, et al.,

Case No.1:21-cv-960

Plaintiffs,

HON. HALA Y. JARBOU
MAG. PHILLIP J. GREEN

v.

GOVERNOR GRETCHEN WHITMER, et al.,

Defendants.

DEFENDANT ELHORN'S MOTION TO DISMISS PURSUANT TO Fed.R. Civ. P.
12(b)(6)

**** Oral Argument Requested ****

NOW COMES Defendant, Elhorn Engineerring Company d/b/a Elhorn Company (hereinafter "Elhorn"), by its attorneys, Cummings, McClorey, Davis and Acho, P.L.C., and for its Motion to Dismiss, brought pursuant to Fed.R. Civ. P. 12(b)(6) states as follows:

1. In the matter of *Braziel, et al. v. Governor Whitmer, et al.*, Case Number 1:21-cv-960, the claim directed against Defendant Elhorn is a State Law based claim of

professional negligence found at Count IV of Plaintiff's Second Amended Class Action Complaint. (ECF No.68, PageID. 484).

2. Defendants' basis for dismissal in the Braziel matter is its request that the Court not exercise supplemental jurisdiction in this matter. The Court is addressing supplemental jurisdiction issues separately. See Court's Omnibus Order, ECF 130, PageID. 1536.
3. In the matter of Grant, et al. v. U.S. Environmental Protection Agency, et al., Case Number 1:22-cv-00186-HYJ-PJG, the Federal Claims against Defendant Elhorn, pursuant to "Plaintiff's Notice to the Court", ECF 67. PageID. 399, alleges two counts of Federal Claims against Defendant Elhorn:
 - Count II. Violation of Due Process pursuant to U.S.C.A. Const. Amend. XIV, Section 1 – Privileges/Due Process Proc - - all Defendants; and
 - Count IV. Violations of 42 U.S.C. §1983 Equal Protection, Substantive, & Procedural Due Process and 42 U.S.C.A. §300g-6 -- Failure to Warn & Bodily Integrity -- All Defendants.
4. Plaintiffs Grant filed an Amended Complaint on November 20, 2022, ECF No. 75, PageID. 438, which added Count XIII, Violation of Freedom of Religion – All DEFENDANTS. Presumably this count directed to "All Defendants," would include private contractor Elhorn. Elhorn first objects to the Amended Complaint as it was filed after the deadline set by the Court's Order requiring the filing by November 14, 2022. ECF No. 70, PageID. 418. Even if the Court allows the Amended Complaint, the Amended Complaint fails to state a cause of action against Elhorn under Count XIII, Violation of FREEDOM OF RELIGION.

5. The remaining claims against Defendant Elhorn are based in State Law and will not be addressed pursuant to the Omnibus Order, ECF 130, Page ID. 1536 until the Court resolves the supplemental jurisdiction issue.
6. Plaintiffs' *Grant* complaint, either the original or the Amended Complaint, fails to state a cause of action against Defendant Elhorn for either violation of due process, Count II or violation of the equal protection clause, Count IV, under the Fourteenth Amendment or Count XIII under the First Amendment of the United States Consitution, of the Amended Complaint, as the relationship between Elhorn as a seller of blended ortho-polyphosphates and equipment used by the City of Benton Harbor in its water treatment plant does not transform Elhorn, a private contractor, into an entity acting under color of state law.
7. Further, there are no factual allegations supporting a constitutional violation by Elhorn.
8. Defendant Elhorn incorporates its Brief in Support of this Motion as well as Co-defendants Briefs in Support of their respective Motions to Dismiss.
9. Pursuant to LivCivR 7.1(d) concurrence was sought from *Grant* Plaintiffs' counsel and Plaintiffs' counsel confirmed on 11/30/2022 that Elhorn's Motion to Dismiss would be opposed.

WHEREFORE, Defendant Elhorn requests that this Court, in regards to the Federal claims being asserted in the *Grant, et al., v. U.S. Environmental Protection Agency, et al.*, Case Number 1:22-cv-00186-HYJ-PJG, dismiss Counts II, IV and XIII (Amended Complaint) against it, dismissing all Federal Claims directed against Defendant Elhorn.

Respectfully submitted,

CUMMINGS, McCLOREY, DAVIS & ACHO, P.L.C.

Date: December 15, 2022

/s/ Meigs M. Day

Meigs M. Day (P36929)

Allan C. Vander Laan (P33893)

Kristen L. Rewa (P73043)

Attorneys for Defendant Elhorn